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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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|---------------------------|--|
| Proceeding | 92054629 |
| Party | Defendant Wohali Outdoors, LLC |
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| Date | 05/30/2013 |
| Attachments | 05-30-13 - Wohali's 1st Supp to Wohali's Objections - Final Submitted.pdf(33274 bytes) |

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

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| In re Registration No. 3,904,929 |) | |
| |) | |
| SHELTERED WINGS, INC. |) | Cancellation No. 92054629 |
| |) | |
| Petitioner/Plaintiff, |) | |
| |) | |
| v. |) | |
| |) | |
| WOHALI OUTDOORS, LLC |) | |
| |) | |
| Respondent/Defendant. |) | |
| |) | |

**WOHALI OUTDOORS, LLC’S FIRST SUPPLEMENT TO:
WOHALI’S OBJECTIONS TO SHELTERED WINGS, INC.’S PRETRIAL
DISCLOSURES (WOHALI’S OBJECTIONS FILED MAY 17, 2013)**

Respondent/Defendant, Wohali Outdoors, LLC (“Wohali”), submits the following supplement in support of Wohali’s Objections to Sheltered Wings, Inc.’s Pretrial Disclosures. This supplement outlines the facts and authority supporting Wohali’s objection/motion.¹

I. STATEMENT OF FACTS

1. On March 5, 2012, Sheltered Wings, Inc. (“Wings”) served its Initial Disclosures.² Ben Lizdas was **not** identified in Wings’ Initial Disclosures. (Ex. 1, Wings’ Initial Disclosures.)

¹ On May 29, 2013, the Court entered an Order in this matter. Among other things, the Order stated: “The Board construes respondent’s May 17, 2013 objections as a motion to limit the scope of testimony taken by petitioner during petitioner’s assigned testimony period...”

² “Initial Disclosures” are governed by TBMP 401.02, 37 CFR §§ 2.120(a)(2) and (3) and FRCP 26(a)(1).

2. On August 24, 2012, (in response to Wohali's motion for summary judgment) Wings filed its opposition brief and included the Declaration of Ben Lizdas. (Ex. 2, Declaration of Ben Lizdas.)

3. Ben Lizdas' Declaration is narrow in scope and is limited to Eagle Optics' marketing and advertising. The Declaration is extremely vague. (Ex. 2, Declaration of Ben Lizdas.)

4. On December 10, 2012, Wings served its Response to Wohali's First Set of Interrogatories. (Wohali had given Wings another opportunity to identify any witnesses Wings intended to use at trial and the subject matter of the testimony.) Wings again elected **not** to identify Ben Lizdas.

“Interrogatory No. 18: Identify all persons Wings intends to submit any testimony of in this matter (whether by declaration, affidavit and/or any other method), and provide with detail the substance and description of such expected testimony.”

“RESPONSE: Petitioner objects to this interrogatory to the extent that it seeks information protected from discovery by the attorney-client privilege, work product doctrine, or any other applicable privilege. **Petitioner also objects to this request because it is premature because discovery is ongoing.”**

(Ex. 3, Wings' Response to Interrogatory No. 18) (emphasis added).

5. On January 15, 2013, Wings served supplemental responses. However, Wings elected **not** to supplement its Response to Interrogatory No. 18. (Ex. 4, Wings' Supplemental Response to Interrogatory No. 18.)

6. On May 3, 2013, Wings served its Pretrial Disclosures, and listed Ben Lizdas as a witness to provide testimony concerning: (i) advertising and promotion; (ii) use of the EAGLE marks; (iii) goods sold and offered; (iv) notoriety of marks; (v) similarity of marks; (vi) strength

of marks; (vii) geographic scope and channels of trade; (viii) level of sophistication; (ix) likelihood of confusion and actual confusion; and (x) that Mr. Lizdas may be used to identify certain documents. (Ex. 5, Wings' Pretrial Disclosures at p. 2-3.)

This subject matter **far exceeds** the scope of Ben Lizdas' Declaration (Ex. 2).

7. Ben Lizdas was **not** identified in Wings' Initial Disclosures; and Wings elected **not** to supplement its Initial Disclosures.

8. Ben Lizdas was **not** identified in Wings' responses to interrogatories (nor in any supplement to same).

9. The discovery cutoff was **March 19, 2013**.

II. BEN LIZDAS' TRIAL TESTIMONY MAY NOT EXCEED THE SCOPE OF HIS DECLARATION

Pursuant to TBMP 401.02, 37 CFR §§ 2.120(a)(2) and (3) and FRCP 26(a)(1), Wings was required to identify all individuals likely to have discoverable information, along with the subjects of such information.

"Fed. R. Civ. P. 26(a)(1) Initial Disclosures.

(A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party **must**, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual **likely to have discoverable information – along with the subjects of that information – that the disclosing party may use to support its claims or defenses**, unless the use would be solely for impeachment;..."

TBMP 401.02 (emphasis added).

"A party need not, through its mandatory initial disclosures, identify particular individuals as prospective trial witnesses, per se, but **must** identify **"each individual likely to have discoverable**

information that the disclosing party may use to support its claims or defenses.” (quoting Fed. R. Civ. P. 26(a)(1)).

Jules Jurgensen/Rhapsody Inc. v. Baumberger, 91 U.S.P.Q.2d 1443, fn 1 (TTAB 2009) (emphasis added).

Ben Lizdas was **not** identified in Wings’ Initial Disclosures. (See Statement of Facts (“SOF”) No. 1 above)). Ben Lizdas was **not** identified in any of Wings’ discovery responses. (SOF Nos. 4, 5 and 8.)

Prior to Wings’ Pretrial Disclosures, the **only** time Wings identified Ben Lizdas was through the Declaration of Ben Lizdas filed with Wings’ summary judgment brief. (SOF No. 2.) The Declaration is narrow in scope and only references Eagle Optics’ advertising and marketing activities. (SOF Nos. 2 and 3.)

Prior to Wings’ Pretrial Disclosures, Wings elected **not** to provide any further information concerning Ben Lizdas. Wings elected **not** to identify Ben Lizdas in either its Initial Disclosures nor in response to discovery requests. Wings should be precluded from presenting any testimony from Ben Lizdas that exceeds the narrow scope of the 5 page Declaration of Ben Lizdas (Ex. 2).

“A responding party which, due to an incomplete search of its records, provides an incomplete response to a discovery request, may not thereafter rely at trial on information from its records which was properly sought in the discovery request but was not included in the response thereto (provided that the requesting party raises the matter by objecting to the evidence in question) unless the response is supplemented in a timely fashion pursuant to Fed. R. Civ. P. 26(e).”

Panda Travel, Inc. v. Resort Option Enterprises, Inc., 94 U.S.P.Q.2d 1789, 2 (TTAB 2009) (emphasis added).

Wings’ attempt to surprise Wohali by “laying behind the log” should **not** be rewarded. Ben Lizdas’ testimony (if offered) should be limited to the narrow scope of the 5 page

Declaration of Ben Lizdas. He should be precluded from testifying about anything not specifically stated therein. *See Jules Jergensen/Rhapsody, Inc. v. USPTO*, 91 U.S.P.Q.2d 1443, 1444-1445 (TTAB 2009) (Witness not disclosed in Initial Disclosures or Pretrial Disclosures was precluded from testifying.)

Here, Wohali would be unfairly prejudiced if Wings was permitted to introduce testimony from Ben Lizdas that is outside the narrow scope of his 5 page Declaration.

III. CONCLUSION/PRAYER

Wings moves the Court to preclude any testimony from Ben Lizdas that exceeds the narrow scope of the 5 page Declaration of Ben Lizdas, and to award any further relief the Court deems just and equitable or for which Wohali proves it is entitled to.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on the 30th day of May, 2013, I caused a true and correct copy of the above and foregoing instrument to be sent to the following parties in the manner indicated below:

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/s/ S. Max Harris

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